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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact	3
B. The Board's conclusions and order	7
C. The decision of the court of appeals	8
Argument	8
Conclusion	11

CITATIONS

Cases:

International Brotherhood of Electrical Workers v. *National Labor Relations Board*, 341 U.S. 694	9
May Department Stores Co. v. *National Labor Relations Board*, 326 U.S. 376	10, 11
National Labor Relations Board v. *Express Publishing Co.*, 312 U.S. 426	9, 10
National Labor Relations Board v. *International Hod Carriers, Local 1140*, 285 F. 2d 394	9
National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333	11

Statutes:

National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 158, 160:	
Section 8(a)(1)	2
Section 10 (a), (c)	2

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 423

FIREDOOR CORPORATION OF AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. 14–22) is reported at 291 F. 2d 328. The Board's decision and order (R. 2–63) [1] are reported at 127 NLRB 1123.

JURISDICTION

The opinion and judgment of the court of appeals were entered on June 9, 1961 (Pet. 12–13). Petitioner's request for rehearing was denied on June 29, 1961 (Pet. 23). The petition for a writ of certiorari

[1] "R." refers to the portions of the record printed as an appendix to the brief filed by the Board in the court of appeals. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence.

was filed on September 20, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on the facts of this case, the court below properly enforced that portion of the Board's order requiring petitioner to cease and desist from coercive interrogation of its employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended, 61 Stat. 136, 29 U.S.C. 158, 160, are as follows:

> Sec. 8. (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7; * * *.
>
> * * * * *
>
> Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. * * *
>
> (c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act * * *.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

In October 1958, organizational activities on behalf of the Union [2] were begun among the 13 "technical" employees of petitioner ("the Company") (R. 6, 19, 40; 74, 185). In October and November, some of the employees signed Union cards which were distributed by employees Romano and Campagnola (R. 6, 40; 74). On November 24, the Union filed a petition with the Board for an election in a unit consisting of listers, take-off men and draftsmen. The same day, the Union informed the Company that it represented a majority of these employees and apprised the Company of its election petition (R. 21; 85–87).

In early December, Barry Mirsky, supervisor of the drafting and listing work, asked at least seven of the employees, including Campagnola and Zeleznik, if they were members of the Union; each denied that he was a member (R. 2, 21; 170–172). On December 11, Mirsky requested the employees to sign a petition, prepared by the Company and addressed to the Board, to the effect that they were not contacted by the Union or were not Union members and that they were revoking all actions taken by the Union on their behalf. All but one of the employees refused to sign the petition (R. 3, 21; 174–175). On December 12, at a meeting of the employees on Company time, the Company's executive vice president, Bernard A. Schecter, referred to a letter from the Union which accused the

[2] Architectural and Engineering Guild, Local 66, American Federation of Technical Engineers, AFL–CIO.

Company of trying to coerce the employees to sign the petition, and told the men that their signing of the petition would have been a vote of confidence in the Company. Schecter also announced that he was cancelling certain benefits theretofore enjoyed by the employees, such as sick leave and wage increases for apprentices. Finally, he requested them to decide "right away" whether they wanted the Union, without awaiting the results of a Board-conducted election (R. 3, 21, 25–26; 66–67, 75–76, 90–93, 117–118, 130–133, 172–174, 177–179, 184–186, 191–193). Following Schecter's remarks, the employees appointed a committee—consisting of Romano, Campagnola, Higgins, and Zeleznik—to tell Schecter that they would await a Board election before determining whether they wanted Union representation, and to find out if he really intended to cancel certain benefits (R. 26, 44, 76). When informed of the decision to await an election, Schecter became angry and again demanded an immediate answer, but the employees adhered to their position (R. 26–27, 44–45; 68–69, 76–79, 93–96, 133–135, 186–187, 193–194).

On January 5, 1959, the Company's president, J. Bernard Sussman, told the employees that he was disappointed with them for seeking Union representation, that he did not wish to have a third party between himself and the employees, and that they need have no fear about layoffs. He suggested that they form a committee to discuss their grievances with him and to formulate proposals. (R. 5–6, 22, 27–28; 69, 79–80, 96–99, 135–137, 175–176, 179–180, 199–203). Mirsky encouraged them to bargain with

the Company and forget about the Union (R. 28–29; 180). The next day, when the employees advised the Company they intended to wait for the Board election, Supervisor Mirsky told the employees in the drafting room, "All right, gentlemen. you have had it now" (R. 29; 71, 102, 141).

Twice during January and early February, President Sussman called Zeleznik into his office and asked him as senior man to talk his fellow employees out of joining the Union. Zeleznik refused, and, instead, signed a Union card (R. 6, 36–37; 108–109, 114, 203–204). On January 19, Mirsky showed the employees a copy of a contract between the Union and another employer, and conveyed to them Sussman's statement that he would give them anything in the contract if they bargained directly with him and abandoned the Union (R. 3, 22, 46; 71–72, 103, 120, 142, 180, 183–184). On January 27, the Union told the Company it would not object to the Company's granting periodic pay increases due trainees (R. 33, 46; 169, 195–198, 205, 209–210). During February, however, the Company informed its trainees, Garbizu, Orsi, and Immerman, that promised wage increases could not be given them because the other employees wanted to get into the Union (R. 3–4, 32–33, 46; 115–116, 121–122, 166–168, 194–195).[3]

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[3] Schecter and Mirsky told Orsi, for example, that, while he deserved a raise, the Company could not give him one because of the Union; Schecter assured him, however, that if he "were to get those damn guys in the back to drop out of the Union, the trainees would receive their raises" (R. 4, 32, 46; 121–122, 194–195).

On March 13, Zeleznik was fired by the Company (R. 5–6, 33–38; 87–90, 103–114, 119, 171, 176–177, 182–183, 198–204). Two weeks later, Mirsky told Zeleznik that he might be able to talk the Company "into taking him back" if Zeleznik "denounced the Union" (R. 38; 114). Similarly, on March 13, the Company discharged Campagnola (R. 2, 6–7, 39–40, 50; 72–75, 82–85, 177, 190).

On April 6, the Board directed that an election be held on the Union's petition (R. 22; 86). On April 17, Schecter told the "technical" employees that this was their last chance for private negotiations with him, and noted the Union's inability to secure a contract with another employer. He also told them that the Company was in poor financial condition. The employees then decided to draft a list of proposals to submit to Schecter (R. 4, 22, 30, 47; 123, 142–143, 156–158, 188). On April 21 and the following day, the employees negotiated with Schecter, on Company time and property, on the proposals and his counter-proposals (R. 22, 30; 124–128, 144–152, 159–165, 181, 188–190). On April 22, agreement was reached, and Schecter promised formally to execute the contract with the employee bargaining committee on April 24, effective April 27, if the Union lost the election (R. 23, 31; 128–130, 152–156, 161, 165, 182, 191). The Board election was held on April 23, 1959. Eight employees voted, 4 for representation by the Union and 4 against (R. 23; 85–87). The agreement promised by the Company was never executed (R. 23; 129–130).

B. THE BOARD'S CONCLUSIONS AND ORDER

The Board concluded that the Company violated Section 8(a)(1) of the Act by the following activities: interrogating employees concerning their union membership and activities; urging employees to persuade others to abandon the Union; preparing a petition for signatures of employees to the effect that they repudiated the Union; promising them benefits if they abstained from union activities; withholding wage increases due some employees because of the advent of the Union; and urging the employees to deal directly with the Company. The Board further found that the Company violated Section 8(a)(2) and (1) of the Act by dominating, interfering with, and furnishing assistance to the formation and administration of the employee bargaining committee. Finally, the Board found that the Company violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging employees Zeleznik and Campagnola because of their Union sympathies and activities (R. 2–8).*

The Board's order required the Company to cease and desist from the unfair labor practices found, and from in any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed by Section 7 of the Act. In particular, as to the issue raised by the petition here, the Board's order required the Com-

*One member of the Board dissented from the finding that Zeleznik and Campagnola were discriminatorily discharged (R. 7–8).

pany to cease and desist from: "Interrogating its employees as to their union activities, interests, or affiliations, in a manner constituting interference, restraint, or coercion; * * *" (R. 8). Affirmatively, the Company was required to offer reinstatement to the discharged employees and to make them whole for any loss of pay suffered by reason of the discrimination against them; to withdraw, and withhold recognition from, and disestablish the employee bargaining committee; and to post appropriate notices (R. 8–15).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals enforced the Board's order in full (Pet. 14–22). While the court disagreed with the Board's finding that Supervisor Mirsky's interrogation of the employees was coercive within the meaning of Section 8(a)(1) of the Act, it nevertheless held that "in the light of the unfair labor practices committed after the interrogation the Board could infer that future interrogation might be coercive and, therefore, order Firedoor not to interrogate its employees in a coercive manner" (Pet. 18).

ARGUMENT

Petitioner's sole contention is that the Board's order as enforced is too broad because it enjoins future coercive questioning as to the employees' Union activities, despite the fact that the court of appeals found that the interrogation, as conducted in this case, was not itself unlawful. This issue presents no question warranting review by this

Court. The issue is of no practical importance, for—in light of the uncontested validity of the clause of the Board's order which prohibits "In any other manner interfering with, restraining, or coercing employees in the exercise of the rights * * * to engage in other concerted activities" (R. 9–10)—"interrogating its employees as to their union activities, interests, or affiliations, in a manner constituting interference, restraint, or coercion" (R. 8) would constitute a violation of the Board's order whether or not separately enjoined.

Moreover, the specific prohibition of the coercive repetition of the conduct which the court of appeals held innocent was clearly proper on the facts of this case even if the court was correct. It is settled that a Board order may enjoin not only the particular unfair labor practice found but also like or related acts which may be anticipated from the wrongdoer's past misconduct. *National Labor Relations Board* v. *Express Publishing Co.*, 312 U.S. 426, 436.[8] Contrary to petitioner's assumption (Pet. 8–9), the possibility of future coercive interrogation could fairly be anticipated from a combination of the employer's manifested "attitude of opposition to the pur-

[8] *National Labor Relations Board* v. *International Hod Carriers, Local 1140*, 285 F. 2d 394 (C.A. 8), cited at page 8 of the petition, is irrelevant here. The issue in that case, involving a secondary boycott situation, was whether the Board's order could properly enjoin the union from exerting secondary pressure not only against the employees of named employers but also those of "any other employer or person." Cf., *International Brotherhood of Electrical Workers* v. *National Labor Relations Board*, 341 U.S. 694, 705–706.

poses of the Act"* and the interrogation of employees which actually took place.

Thus, while the court rejected the Board's finding that the questioning conducted in this case tended to restrain or coerce the employees in violation of Section 8(a)(1), it upheld the Board's findings that the Company violated Section 8(a)(1) by urging employees to persuade others to abandon the Union, preparing a union-repudiation petition, threatening employees with reprisals if they adhered to the Union, promising benefits for abstaining from union activities, withholding wage increases, and urging the employees to deal directly with the Company. Moreover, the court sustained the Board's Section 8(a)(2) and (3) findings respecting the Company's unlawful formation and administration of an employee committee and its discriminatory discharge of two Union adherents. In view of these findings, which reveal a patent effort to defeat unionization by whatever means necessary, the court below could justifiably conclude, as it did, that past interrogation might be repeated and that, if repeated, it "would have a coercive effect upon the employees" (Pet. 20). Accordingly, the proscription against future coercive interrogation embodied in the order as enforced touched upon violations that "bear some resemblance to that which the employer has committed" (*Express Publishing Co., supra,* 312 U.S. at 437), and was well "adapted to the situation which calls for redress."

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* *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 392.

National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348. See also, *May Department Stores Co.* v. *National Labor Relations Board*, 326 U.S. 376, 390–392.[1]

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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October, 1961.

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[1] Petitioner's contention (Pet. 4–6) that the order constitutes a blanket prohibition against all future interrogation, regardless of subject matter or manner, which raises questions under the First Amendment and Section 8(c) of the Act, is plainly without substance, as a reading of the relevant portion of the order readily discloses. The order proscribes interrogation of employees "as to their union activities, interests, or affiliations, in a manner constituting interference, restraint, or coercion * * *" (R. 8), and nothing more. This specific and definitive order in no way interferes with the Company's right to engage in lawful and reasonable communication with its employees.

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